ALLEN & OVERY

Global trends in merger control enforcement

March 2020

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In 2019, set against a landscape of policy debates and attempts by certain politicians to influence merger reviews, antitrust authorities got tough. More than 40 deals were prohibited or abandoned due to antitrust concerns. A further 143 were subject to remedies. And authorities continued their unflinching approach to breaches of procedural rules. Going into 2020, we expect even more action, as intervention levels look set to stay high, and authorities consider what rule changes might be needed to answer the increasingly loud calls for reform.

Scope of the report

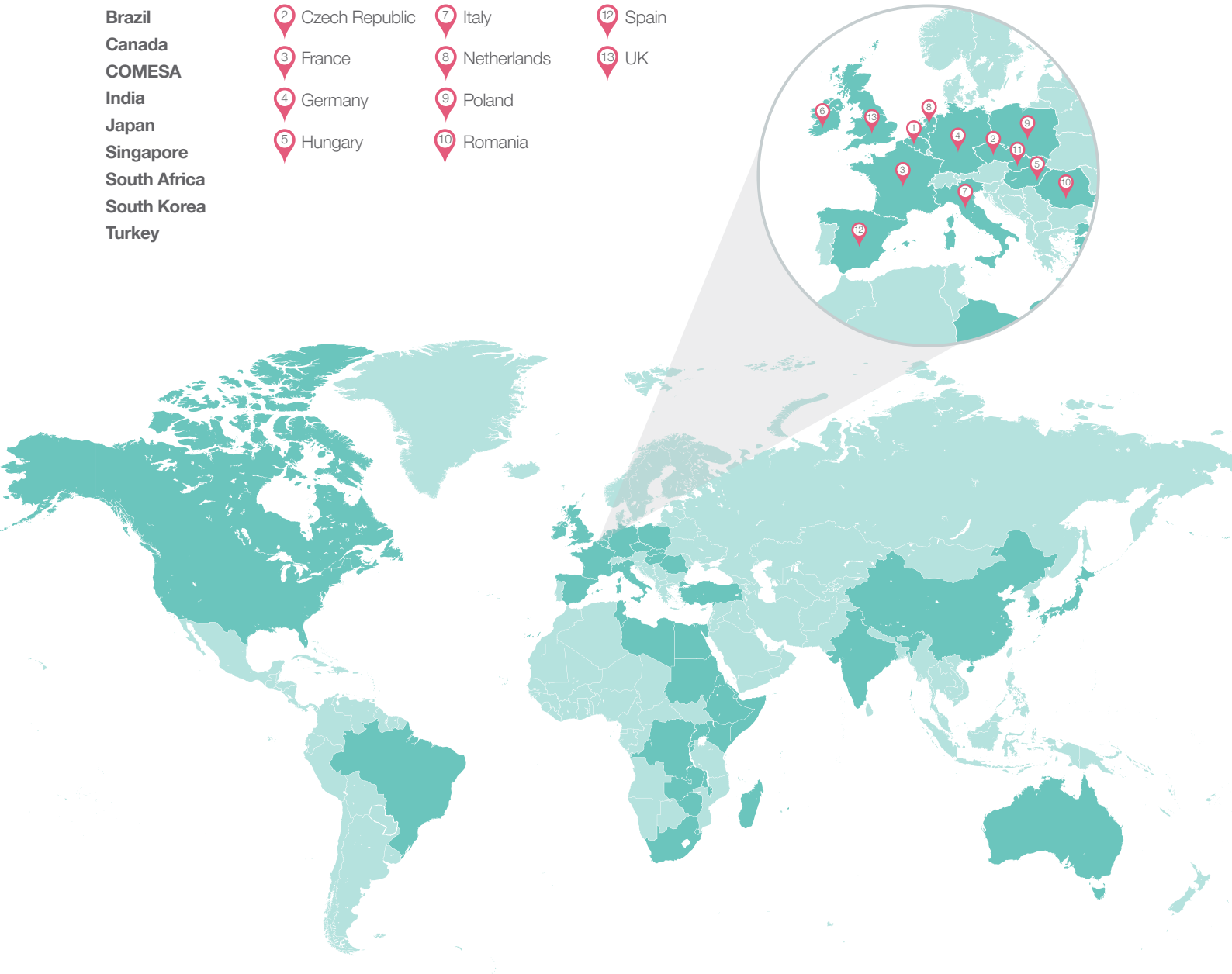
We have collected and analysed data on merger control activity for 2019 from 26 jurisdictions, focusing in particular on the EU, U.S. and China.

JURISDICTIONS SURVEYED

U.S.
China
Australia
Brazil
Canada
COMESA
India
Japan
Singapore
South Africa
South Korea
Turkey

EU

1. Belgium
2. Czech Republic
3. France
4. Germany
5. Hungary
6. Ireland
7. Italy
8. Netherlands
9. Poland
10. Romania
11. Slovakia
12. Spain
13. UK



Introduction

In 2019 global M&A activity fell slightly, with value of announced deals down by 10% to USD3.3 trillion. But the market nevertheless remained above USD3trn for the sixth year in a row, and close to historic highs.[1] Declining numbers of deals at the lower end of the size spectrum were offset by a resurgence of 'megadeals' – we saw a 4% uptick in the value of announced deals worth more than USD10 billion. In fact, there were almost 40 announced deals in this bracket in 2019, accounting for over USD1trn.

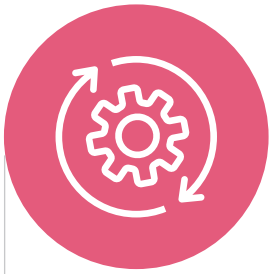
Cross-border transactions continued to decline. Faced with an uncertain global environment – centred on trade tensions between the U.S. and China – firms showed a preference for strategic domestic deals, both in the U.S. and globally. Remarkably, the top 10 deals in 2019 were all home-grown within one country,[2] creating a climate which increases the likelihood that industry consolidation will raise antitrust issues.

Within this overall landscape we witnessed antitrust authorities take a tough approach. In the EU a record number of deals were blocked by the European Commission (EC). This included the headline grabbing Siemens/Alstom, following which we saw major political fallout including calls for urgent changes to the EU merger control rules. This did not, however, dampen Competition Commissioner Vestager's prospects. In November she was appointed for a second term – the first time we have ever seen such a re-election – combined with an expanded portfolio which looks set to place the digital sector at the forefront of the EC's scrutiny in the coming months and years. And in the UK, we saw the Competition and Markets Authority (CMA) ramp up merger enforcement significantly, cementing the position of UK merger control as a regime with teeth as it makes preparations for Brexit.

2019 highlights

From policy to action: merger control gets tough

– The UK was the standout enforcer (as well as the EU and Germany)



Changing the rules and adapting approaches: expect more

– Through revised thresholds and sharpened analysis

Political considerations make a comeback (and the EC fights back)

– Politicians attempt to influence merger analysis but the EC resists

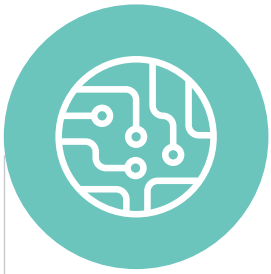
[1] Source: Refinitiv, Full Year 2019.
[2] See Allen & Overy's M&A Insights, Q4 2019, which can be found here, for more information.

Across the Atlantic in the U.S., the Department of Justice (DOJ) started 2019 bruised from its defeat in court over its challenge to AT&T/Time-Warner. It then faced another high profile TMT megadeal – T-Mobile/Sprint – which it approved subject to remedies over the summer. The transaction was promptly challenged in federal court by a coalition of State Attorneys General and, while the action ultimately failed, it is in line with a wider trend which has seen the revival of intervention by State AGs in other areas of antitrust outside merger control. More generally, we saw 2019 intervention levels by U.S. antitrust agencies remain steady.

Looking to China, and despite the concerns often raised by merging parties about the perceived difficulties of the merger review process, we saw no prohibited or abandoned deals in 2019. The new agency (State Administration for Market Regulation, SAMR) has had time to bed down since its creation in 2018. Contrary to initial fears, our analysis shows no overall increase in intervention levels or any adverse impact on duration of reviews. This includes deals involving U.S. firms, which some had thought could be negatively affected as a result of the trade tensions. The phase 1 trade deal recently agreed with the U.S. may also help to ease any existing concerns harboured by U.S.-based merging parties. Having said this, it is clear that transactions in certain industries (notably semiconductors) continue to face close scrutiny, a trend we are seeing persist into 2020.

But rules are rules

– Strict enforcement of procedural provisions continues across the globe



TMT sector sees rising antitrust intervention

– With industrials, life sciences and transport also targeted

Remedies cases remain high (with behavioural commitments a permanent fixture)

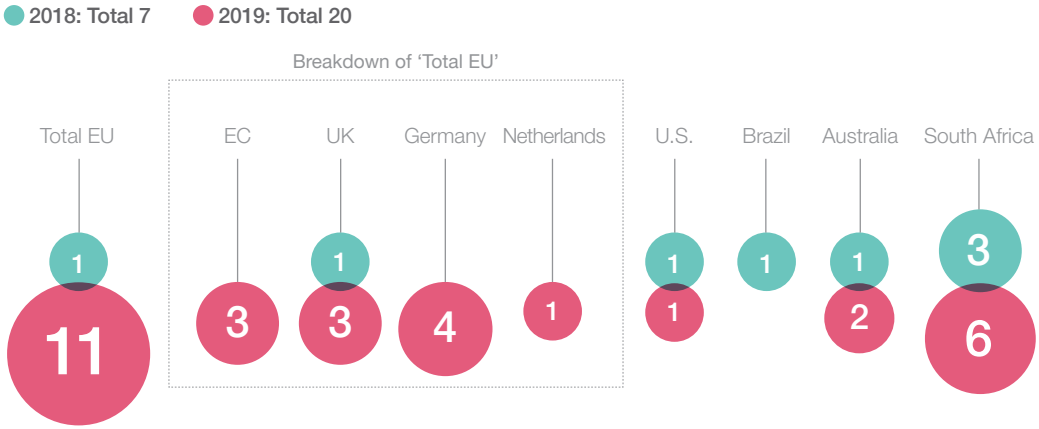
– Over half of all remedies cases had a behavioural element

From policy to action: merger control gets tough

TOTAL DEALS FRUSTRATED

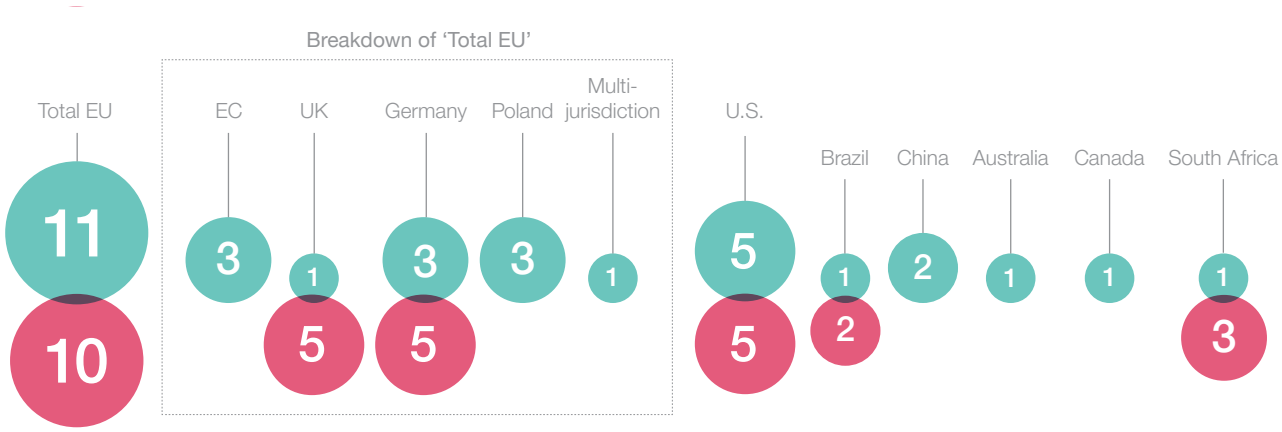
DEALS PROHIBITED

by volume



DEALS ABANDONED

by volume, allocated to jurisdiction where antitrust concerns led to parties' decision to abandon the deal



In 2019 we saw the publication of a number of policy reports in jurisdictions across the globe. Many alleged a degree of under-enforcement by antitrust authorities, including in relation to merger control. As the year progressed, voices supporting this position became louder, and debates in policy circles intensified. Antitrust authorities responded. We saw a clear toughening in their stance, particularly in Europe. In 2019 a total of 40 deals were frustrated (ie prohibited or abandoned) in the jurisdictions surveyed, up 38% from the previous year. This included some extremely high profile cases, such as the EC's prohibition of Siemens/Alstom and the blocked Sainsbury/Asda mega-retail merger in the UK.

At EU-level, the EC notched up three prohibitions in total. In addition to Siemens/Alstom, it blocked a copper deal (Wieland/Aurubis) and a steel products merger (Tata Steel/ThyssenKrupp). This marks the highest number of prohibitions in a single year since the EU Merger Regulation was adopted in 2004. In all three cases it appears that a conditional clearance would have been possible, but in each the parties offered remedies that fell short of meeting the EC's concerns.

In the UK, the CMA was the standout tough enforcer in 2019. Alongside Sainsbury/Asda, we saw a number of key deals frustrated, many of these in the technology sector. See the box on the following page for more on the CMA's enforcement record and its preparations for a future outside the EU.

Elsewhere in Europe the German Federal Cartel Office (FCO) flexed its muscles by frustrating nine cases in 2019. It blocked four deals, the highest in a single year since 2012, and a significant increase given that it prohibited only two transactions in total between 2015 and 2018. Five deals were abandoned. The FCO's tough approach in merger reviews echoes its enforcement record in other areas of antitrust, particularly cartels.[3]

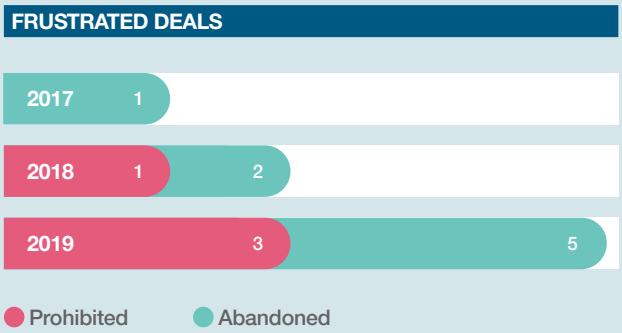
Outside Europe we also saw upticks in frustration levels. Two deals were blocked in Australia. In South Africa six deals were prohibited and three more were abandoned.

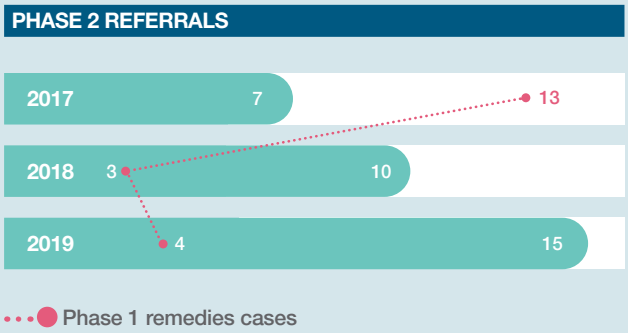
The U.S. antitrust agencies, however, bucked this trend. We saw enforcement levels stay steady – in line with 2018 only one deal was formally prohibited following the issuance of a preliminary injunction (Sanford Health/Mid Dakota Clinic) and a further five transactions were abandoned. The DOJ suffered a blow in April when its landmark court defeat in AT&T/Time Warner was confirmed by a court of appeals. The Federal Trade Commission (FTC) did however successfully challenge a completed transaction which did not meet the U.S. merger thresholds, culminating in the acquirer having to sell off the target's assets.[4]

Despite an enforcement 'plateau' at agency level, a key U.S. development was the revival of the role of State Attorneys General in merger control. In June 2019 nearly two dozen AGs challenged the merger between T-Mobile and Sprint, even though the deal had received the approval of both the DOJ and Federal Communications Commission. While the suit was ultimately unsuccessful – a New York federal court rejected it in February 2020 – it sends merging parties a warning that a clearance from the antitrust agencies may not be the end of the story. This, combined with a flurry of agency challenges to both domestic and international deals towards the end of 2019, indicates that U.S. merger enforcement will be one to watch in the coming year.

[3] For more on the FCO's cartel enforcement record, see our Global cartel enforcement report, published February 2020, which can be found here.
[4] Otto Bock Healthcare/Freedom Innovations.

UK CMA the standout enforcer as the UK plots its way outside the EU





55 Average number of merger decisions per year (over past five years)

83 Average number of merger decisions including post-Brexit estimate

We observed an exponential increase in intervention by the CMA in 2019. The Tyrie/Coscelli leadership now has its first full calendar year under its belt and the results have been significant.

The total number of deals frustrated by the CMA was nearly three times higher than in 2018. Three were blocked – more than in the previous four years put together. The high-profile prohibition of Sainsbury/Asda caught the attention of politicians and the public alike. And the CMA intervened in two completed transactions (Tobii/Smartbox and Ecolab/Holchem), in each case effectively 'unscrambling' the whole deal by requiring the acquirer to sell off the target business. A further five mergers were abandoned, up from only two in 2018.[5] This included Thermo Fisher/Gatan which was waived through in the U.S. but stumbled under CMA scrutiny in the UK.

In more evidence of the increasing enforcement bite of the CMA we saw a substantial uptick in the number of cases referred to an in-depth investigation – up 50% from 10 to 15. Fines for procedural breaches of the rules also rocketed (see later in the report for more details). And the CMA showed its willingness to take an expansive approach to jurisdiction, including reviewing minority stakes (Amazon/Deliveroo and E.ON/RWE), and closely scrutinising deals which appear to have only a limited nexus to the UK (Thermo Fisher/Gatan being a good example: Gatan generates only around 5% of its global revenues in the UK).

This trend of heightened UK intervention looks set to continue into 2020. We have already seen Illumina abandon its planned purchase of PacBio after the CMA announced its provisional decision to block the deal (the transaction was also challenged in the U.S.). Prosafe/Floatel has met a similar fate. The CMA has also provisionally decided to prohibit two further deals (Sabre/Farelogix and JD Sports/Footasylum). In addition we expect to get an update on proposals put forward by Lord Tyrie to the UK government in February 2019 which would, if adopted, give the UK regime even more teeth.[6] Specifically, he recommended the introduction of a mandatory regime for mergers above a certain threshold. While the exact threshold was not specified, Lord Tyrie noted it should be set at a level to catch larger deals that are typically reviewed by multiple international antitrust authorities.

Planning for Brexit was a top priority for the CMA in 2019. The UK has now left the EU with a withdrawal agreement and, until the end of the implementation period, it will be business as usual for the CMA's merger division. For now, therefore, the UK is still subject to the 'one-stop-shop principle' meaning that the CMA is prevented (with only limited exceptions) from reviewing a deal that is being looked at by the EC.

At the end of the implementation period – whether this on 31 December 2020 or a later date – it will be a different ball game. While the exact detail will depend on the terms of the future trade agreement, the key principle is that the CMA will be able to review a merger in parallel with the EC. For merging parties, this means a potential extra merger filing to add to the mix, bringing with it an additional drain on business resources and increased filing fees (the CMA charges up to GBP160,000 depending on the size of the deal). The CMA estimates that post-Brexit it will see a 50% uplift in the number of merger cases (and has been recruiting more staff in preparation). All in all, the expected growth in the CMA's caseload, together with its increased interventionist approach, means that the UK is likely to continue to feature prominently in future editions of this report.

[5] One of the two, Horizon/Brink, was abandoned following concerns in both the UK and Germany.
[6] Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy, 21 February 2019.

"The total number of deals frustrated by the CMA was nearly three times higher than in 2018... This trend of heightened UK intervention looks set to continue into 2020."

Changing the rules and adapting approaches: expect more

In addition to the surge in merger control enforcement already discussed, we expect the increasing calls for change heard last year to translate into a process of reform to the merger rules. At the very least, these calls are highly likely to inform how the antitrust authorities approach their merger analysis and the tools they use to carry out their assessments. In fact, in certain jurisdictions, some of these changes are already emerging.

Much of the debate and expert reports published in 2019 focused on the digital sector,[7] aiming to assess whether current merger control rules are fit for purpose in a fast-evolving digital era. It is here that we expect to see proposals for change gaining the most traction, and at the quickest pace. But the digital sector is only one (albeit large) part of the story. Some of the amendments suggested would, if adopted, impact all areas of merger control policy and enforcement. There are five key areas of potential reform.

01 Catching more transactions

Antitrust authorities are keen to ensure their merger control thresholds are set at the 'right' level, so that potentially anti-competitive deals do not slip through the net. This issue has been discussed at length in relation to so-called 'killer acquisitions', a term used to refer to acquisitions of start-ups/targets with pipeline products – mainly in the digital or pharma sectors – by large players with the aim of preventing the target emerging as a potential rival. Introducing deal value merger control thresholds, which catch transactions even where the target has no, or little, turnover, is widely viewed as a key solution. Germany and Austria adopted such thresholds in 2017, although we are yet to see any headline grabbing interventions. Japan followed suit in late 2019. Other jurisdictions, including Brazil, India and South Korea are considering a similar threshold change. For now, the EU seems content to keep a watching brief.

02 Minority stakes

Antitrust authorities in certain jurisdictions have the ability to review a large number of minority stakes – the UK, Germany and Brazil are good examples. Many others, however, do not. In recent years we have seen calls for merger control rules to be expanded on this front, based on a perception that some minority stake transactions might raise antitrust concerns but escape review. The EC in particular has considered the issue, but is yet to take any concrete steps. Enforcement activity in relation to minority stakes in 2019 may, however, prompt the EC (and others) to take another look. In the UK, for example, the CMA referred Amazon's acquisition of a minority (undisclosed) stake in online food delivery company Deliveroo to an in-depth investigation. It found that Amazon's expertise in online marketplaces, logistics and subscription services could allow it to influence other Deliveroo shareholders and board members. The outcome of the review is eagerly awaited.

03 Asymmetric solutions applying to firms with market power

Merger control rules, for the most part, apply equally to all merging parties (sector specific rules in certain jurisdictions being a limited exception). But last year we saw calls for changes which would disrupt this level playing field, suggesting an approach where certain (but not all) firms would be subject to an additional burden to notify. In both the UK and Australia, for example, studies into the digital sector have concluded that there may be a case for some firms – such as those having "strategic market status"[8] – to notify every transaction to the antitrust authority for review. These are bold suggestions in the context of the UK and Australian voluntary merger regimes. Most recently, in France, we have seen similar proposals.

04 Reversing the burden of proof

The burden of proving that a deal is anti-competitive usually rests with the antitrust authority. But there have been strong suggestions, in particular in the EU expert report into digital markets,[9] for a shift in this burden of proof. The obligation would then be on the merging parties to show that any adverse impact on competition is offset by merger-specific efficiencies. This would amount to a radical departure from well-established merger control principles. While Commissioner Vestager has indicated she may be willing to consider such a shift in the context of antitrust enforcement, she has made no similar statement in relation to merger control. As yet we remain unconvinced that this particular proposal will gain much traction.

05 Sharpening the analysis

Alongside proposed changes to the rules, in 2019 we saw antitrust authorities continue to adapt their techniques and approaches. They aimed in particular to sharpen their analysis in response to challenges posed by digitisation and globalisation.

– Commissioner Vestager announced the revamp of the EC's 22 year-old guidelines on market definition (which applies to all areas of antitrust including merger control).[10]

– Mergers aggregating important data were very much in focus. There are few precedents so far, but we did see instances of authorities agreeing remedies which require the grant of access to data (see, eg the Dutch conditional clearance of Sanoma/Iddink) or interoperability. Expect more of these types of cases going forward.

– Particularly in the UK, U.S. and EU, concerns over the impact of transactions on innovation and 'dynamic' competition were front and centre. Early in 2019 Experian's planned purchase of Clearscore was abandoned following adverse provisional findings by the UK CMA which was concerned the deal could stifle product development in credit scoring. We are seeing this carry over into 2020: Illumina's acquisition of PacBio was abandoned in January after both the CMA and FTC raised concerns that the removal of PacBio as an independent competitor would reduce overall levels of innovation in the market.

– And, in order to inform their analysis and provide evidence of the 'real' rationale behind a transaction, authorities continued to request huge numbers of internal documents from the parties – over a million, for example, in the EC's review of Tata Steel/ThyssenKrupp. We saw authorities refer to internal documents numerous times in their decisions, often when dismissing key arguments of the parties.[11] The EC's much awaited guidelines on handling internal documents requests remained elusive – hopefully finalising and publishing this will be a priority for 2020.

Looking ahead, it will be fascinating to see how many of these proposals are taken forward, and in which jurisdictions. Expect antitrust authorities to continue to hone their approaches, including by carrying out studies of past digital merger cases in order to learn from previous experiences (following in the footsteps of the Lear report commissioned by the UK CMA last year[12]). After a year of debate in 2019, we are geared up for 2020 to be year of action.

[7] Expert reports were published in many different jurisdictions in 2019, including the EU ("Competition Policy for the digital era", 4 April 2019), UK ("Unlocking digital competition, Report of the Digital Competition Expert Panel", 13 March 2019), U.S. ("Stigler Committee on Digital Platforms: Final Report", 16 September 2019) and Germany ("A New Competition Framework for the Digital Economy, Report by the Commission 'Competition Law 4.0'", 9 September 2019).
[8] See "Unlocking digital competition, Report of the Digital Competition Expert Panel", 13 March 2019.
[9] See footnote 7.
[10] "Defining markets in a new age", speech by Margrethe Vestager, 9 December 2019.
[11] See, for example, the EC's decision in Siemens/Alstom, which refers to the parties' internal documents in rejecting their arguments that they would face substantial competition from firms based in China.
[12] "Ex-post Assessment of Merger Control Decisions in Digital Markets", Document prepared by Lear for the Competition and Markets Authority, 9 May 2019.

Political considerations make a comeback (and the EC fights back)

The EC's prohibition of Siemens/Alstom in February last year generated a political furore the likes of which we had not witnessed for many years. In the weeks running up to the decision we saw an unprecedented attempt by politicians in France and Germany to influence the EC's merger analysis – calling for the deal to be approved in order to create one of the world's largest rail companies capable of competing with Chinese-based rivals.

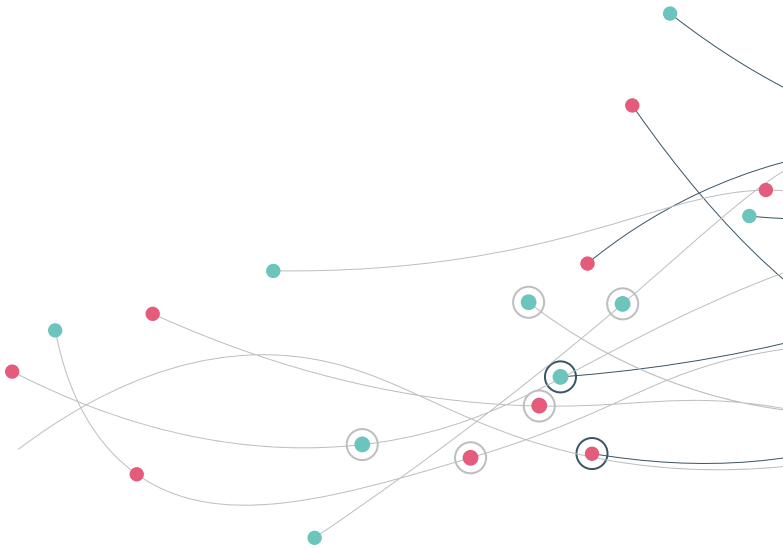
After the deal was blocked the political fallout was immediate. Within days, the French and German governments published a proposal[13] – later endorsed by Poland – calling for EU merger rules to be reformed in order to take industrial policy considerations into account in merger assessments and to better support the creation of 'European champions'. They demanded that merger guidelines be updated to ensure that competition at a global level is considered and, most radically, for Member State representatives to have the power to intervene in the process and override EC decisions (although they have since appeared to rein in their proposals on this point). More recently, in February 2020, these governments (joined by Italy) urged Commissioner Vestager to modernise the horizontal merger guidelines, clarify the efficiencies taken into account in the merger analysis and assess the viability of behavioural remedies on a case-by-case basis.

Commissioner Vestager adopted a brave and firm stance in response. She has stood by her decision to block the deal, and the effectiveness of the current EU merger review process, and has repeatedly argued that European champions cannot be built by undermining competition. A number of national antitrust authorities and Member States support this position. But that is not to say that Vestager is closed to all of the proposals made by France and Germany. As already reported, at the end of 2019 she announced the review of the EC's market definition guidelines, one of the aims being to tweak the guidance on geographic markets in light of globalisation.

And none of this has affected Vestager's prospects. In November she was re-elected for a second term as Competition Commissioner, this time with an expanded portfolio which tasks her with co-ordinating EC policy across the whole digital economy.[14] Despite facing some questions as to whether her new dual role as both policy-setter and enforcer raises an inherent conflict of interest, she is confident in the independence and impartiality of the EC's decision-making process.

In fact, the EU merger control process is designed to be isolated from political influence by Member States. The Siemens/Alstom experience demonstrates just how this was intended to work. The position is, however, different in other jurisdictions. In the U.S., political considerations play a much greater part in merger control. During the course of 2019 we have in particular seen FTC commissioners split along party lines in both enforcement cases and policy issues. In three of the eight merger settlements reached by the FTC in 2019, the two Democrats dissented. And in relation to the recently published draft joint guidelines on vertical mergers, the two Democratic FTC commissioners abstained from the vote to approve the draft, expressing concerns that the guidelines are not sufficiently aggressive. It is important, however, to put all of this in context – any political focus in the merger control process is tempered by the rigorous scrutiny of the U.S. courts.

Elsewhere, in 2019 we saw evidence of governments using public interest considerations to override merger control prohibitions by antitrust authorities. In the Netherlands, a blocked postal sector deal between PostNL and Sandd was permitted by the Minister who found a broader consideration of social interests (ie ensuring mail delivery remains affordable, available and reliable in a sharply declining market) outweighed any restriction of competition. Similarly in Germany, the FCO's prohibition of Miba/Zollern was overturned on the basis that any impact on competition was outweighed by the joint



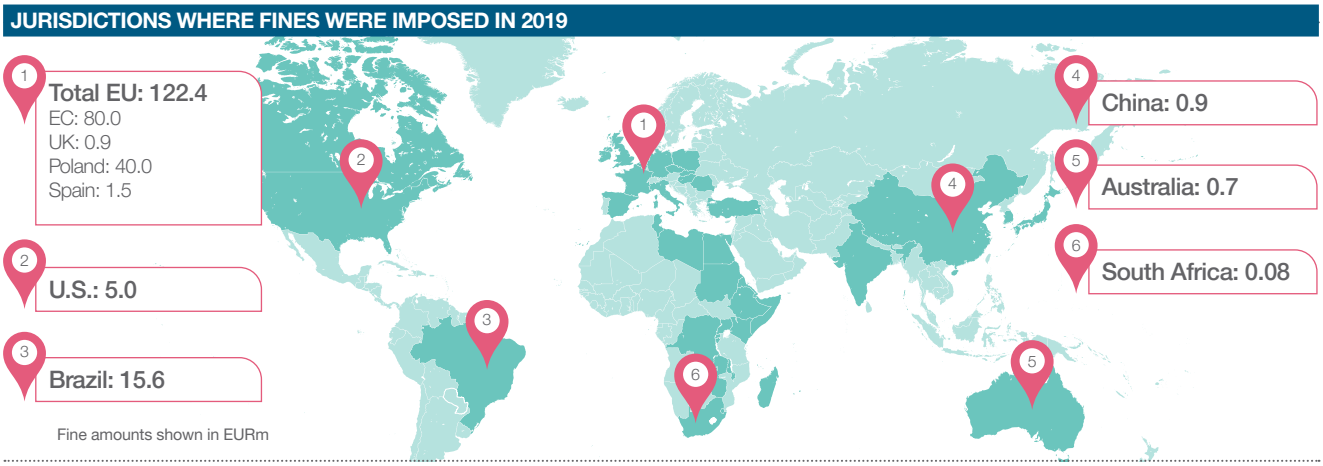
venture's environmental policy objective (the JV was to develop bearings for renewable wind energy). Both clearances were granted subject to conditions.

Separately, jurisdictions took further steps to strengthen their foreign investment control regimes. In France, a jurisdiction which is traditionally very sensitive to foreign investment, 2019 saw an extension of the sectors subject to the regime and bolstered powers to impose sanctions. Even more reforms are due to take effect in April 2020. The UK, which is historically more liberal in this respect, has put forward proposals for a new far-reaching regime to scrutinise deals which may raise national security concerns. In response to these trends, the EC proposed an EU-wide framework for screening proposed foreign direct investment at Member State level to ensure a certain degree of coordination across the bloc. This was finally adopted in March 2019, and will start to apply from October 2020. The U.S. has a well-established system of foreign investment control. In 2019 the Committee on Foreign Investment in the United States (CFIUS) continued to carefully scrutinise in-bound investment, reviewing more deals and taking longer to do so. Its authority was also expanded to include non-controlling investments by non-U.S. acquirers into businesses dealing with critical technologies/infrastructure, as well as those which collect or maintain sensitive personal data of U.S. citizens. And in China, while new foreign investment rules (which took effect on 1 January 2020) are primarily aimed at removing barriers to foreign investment and giving non-Chinese investors rights equivalent to those of domestic firms, we will continue to see close scrutiny of deals in sensitive sectors or with a potential impact on national security. Overall, with no let-up in sight, the regulatory landscape continues to become more complex and burdensome for merging parties.

"Commissioner Vestager adopted a brave and firm stance... She has stood by... the effectiveness of the EU merger review process, and has repeatedly argued that European Champions cannot be build by undermining competition."

[13] "A Franco-German Manifesto for a European industrial policy fit for the 21st Century", 19 February 2019.
[14] For more on what to expect from the new EC see our publication The von der Leyen Commission, January 2020, which can be found here.

But rules are rules



Policing compliance with procedural merger rules remained high on the authorities' agenda in 2019. A total of EUR144.6m fines were imposed in 40 cases in the jurisdictions surveyed. This remains in step with last year's totals.

The EC once again led the charge. It imposed substantial fines in two cases, although neither reached the eye-watering amounts faced by Facebook (EUR110m) or Altice (EUR124.5m) in previous years. In April the EC fined GE EUR52m for allegedly providing incorrect information in its original notification of the acquisition of LM Wind in 2017. It then penalised Canon for using a two-step 'warehousing' structure involving an interim buyer in order to acquire Toshiba Medical Systems, imposing a fine of EUR28m. Canon has appealed. More fines may be on the cards in 2020 as the EC progresses two on-going cases.[15] We also await the Court of Justice's ruling in Marine Harvest, which should set an important precedent for parties notifying public bids/series of transactions under the EU merger rules.

In the UK, the CMA ramped up enforcement considerably. In 2019 it was one of the most active antitrust authorities in targeting breaches of procedural merger rules, reaching decisions in nine cases. See the separate box for more details.

Last year we saw authorities in both Ireland and Australia notch up their first ever gun-jumping findings. In Ireland, while formal fines were not imposed, two merging parties were each ordered to make a EUR2,000 charitable donation after they entered guilty pleas. The Australian Competition and Consumer Commission fined Cryosite AUD1.05m for cartel conduct in the context of an asset sale agreement, which ultimately did not complete.

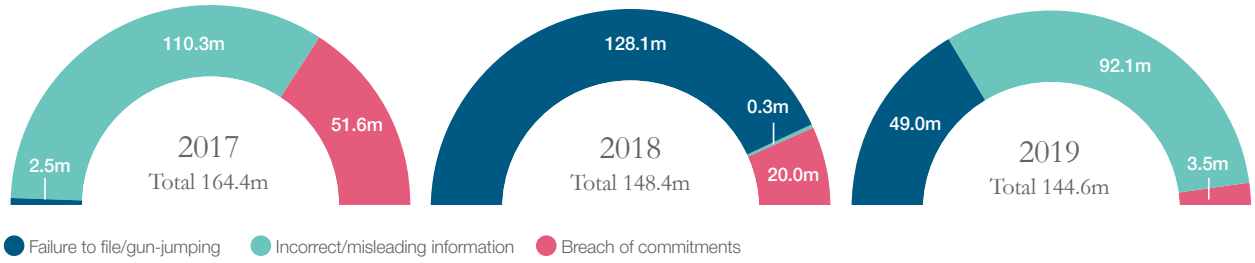
After a relatively quiet year in 2018 the U.S. antitrust agencies stepped up activity in 2019 with two significant fines for breaching HSR reporting requirements. Alongside the EC, the DOJ fined Canon/Toshiba Medical Systems (USD2.5m each). And Third Point funds were penalised over USD600,000 for failure to file and gun-jumping in relation to the acquisition of stakes in DowDuPont.

Brazil's CADE also broke records in 2019, imposing its highest-ever gun-jumping fine on Red Hat (BRL57m, approx. EUR13.4m). The decision is a clear reminder that closing a deal globally while holding-separate in Brazil until merger clearance is obtained – a strategy that is possible in some jurisdictions – is not acceptable under the Brazilian regime.

In China, SAMR had another record-breaking year, imposing fines in 18 cases, up from 15 in 2018. Total fines reached nearly EUR900,000, which is low compared to many other jurisdictions. But repeated calls by SAMR for increased fining powers may well bear fruit: draft amendments to the Chinese rules published in January 2020 propose a maximum penalty of 10% of turnover – a huge uplift from the current CNY500,000 (EUR65,000) cap. We will keep a close eye on how this develops.

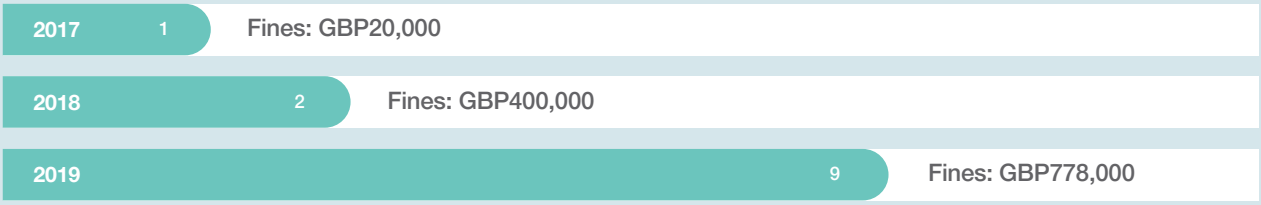
[15] It is investigating (1) Merck and Sigma Aldrich over suspected provision of incorrect or misleading information and (2) Telefónica Deutschland over an alleged breach of commitments in relation to its acquisition of E-Plus.

TOTAL FINES FOR 2017-2019 SPLIT BY FINE TYPE (EUR)



The UK takes a hard line

PROCEDURAL INFRINGEMENTS



As a voluntary regime, the UK merger control rules contain no 'standstill' obligation as such. But the CMA has the power to impose initial enforcement orders (IEOs) which have the same effect. In 2018 we saw it take its first ever enforcement action for breaches of IEOs. In 2019 it imposed fines in four more cases.[16] Infringements included using the acquirer's branded vehicles to deliver to the target's customers, appointing the CFO of the acquirer as a director of the target without seeking CMA consent and conducting cross-selling pilot campaigns which inadvertently involved UK customers. Fines have so far been relatively low (up to GBP250,000), but the CMA has the power to impose penalties of up to 5% of global turnover. We may well see penalties rise in future.

In 2019 we also saw the first ever 'unwinding' orders. These enable the CMA to reverse steps taken by parties to integrate their businesses prior to receiving clearance. In Tobii/Smartbox the parties were ordered to terminate a reseller agreement and reinstate development of projects. And Bottomline was required not to use commercially sensitive data related to the target (Experian) business and to keep all target confidential data separate for the duration of the merger review.

Finally, three fines were imposed for failing to comply with information requests.[17] Again, the amounts were not high – there is a GBP30,000 cap for such infringements – but it is yet further evidence of the CMA's willingness to take action.

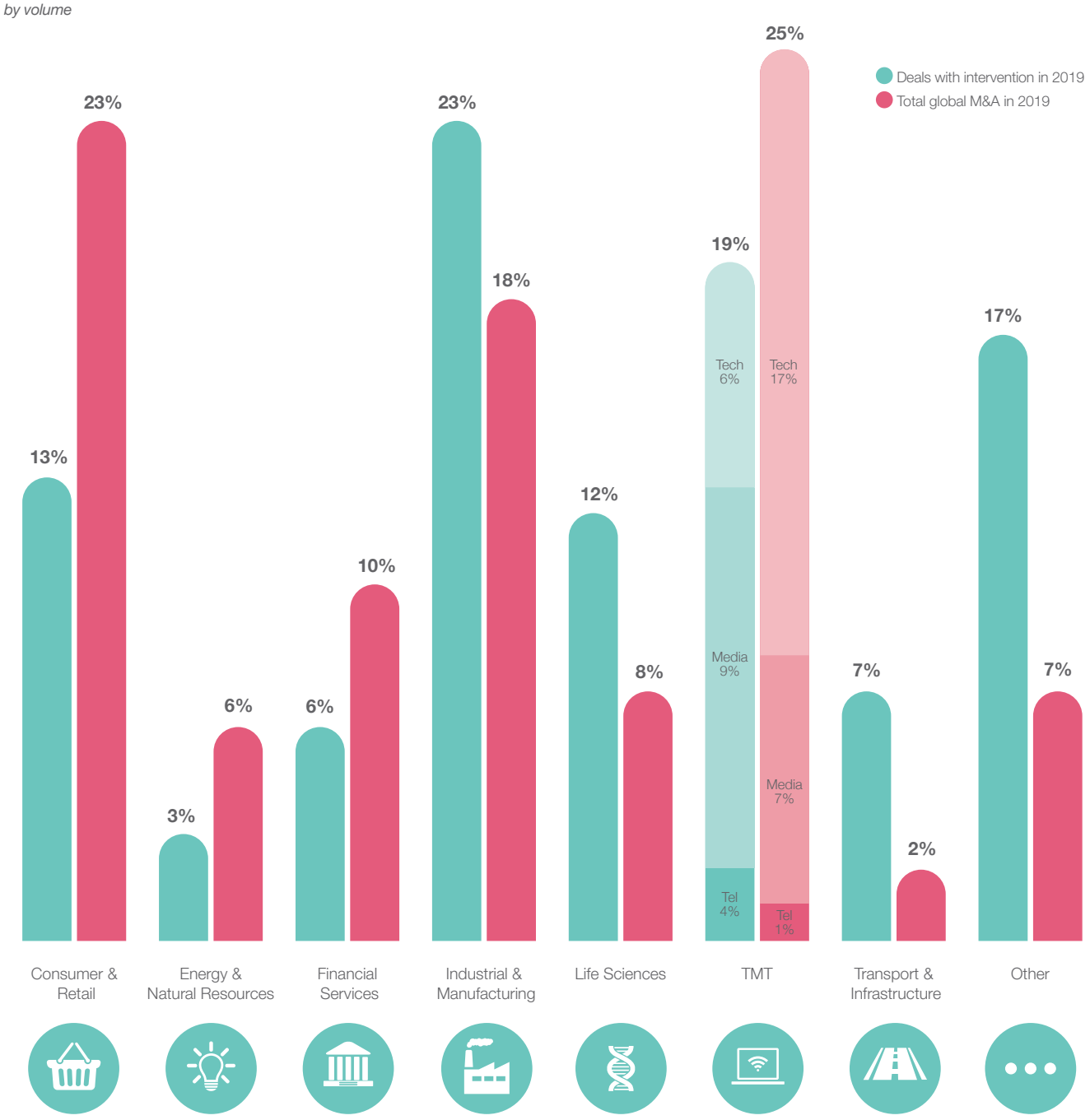
When it comes to the procedural merger rules, compliance is therefore key. Detailed new guidance on information requests and initial enforcement orders published by the CMA last year should, however, help parties to stay on the right side of the line.

[16] Paypal/iZettle (GBP250,000), Nicholls' (Fuel Oils)/DCC Energy (GBP146,000), JLA/Washstation (GBP120,000) and, for the second time, Electro Rent/Microlease (GBP200,000).
[17] Sabre/Farelogix (GBP20,000), Rentokil/MPCL (GBP27,000) and AL-KO Kober (GBP15,000).

TMT sector sees rising antitrust intervention

TOTAL ANTITRUST INTERVENTION BY SECTOR

by volume



The digital/TMT sector found itself squarely in the antitrust spotlight in 2019. In relation to merger control in particular, we saw intense policy debates and a whole host of expert reports (mentioned earlier in the report), all grappling with the issue of how best to deal with transactions in the digital sector. At first sight this does not appear to have translated into increased enforcement action by antitrust authorities – the proportion of antitrust intervention in the TMT sector was only 19% in 2019, compared to 25% of global completed M&A.[18]

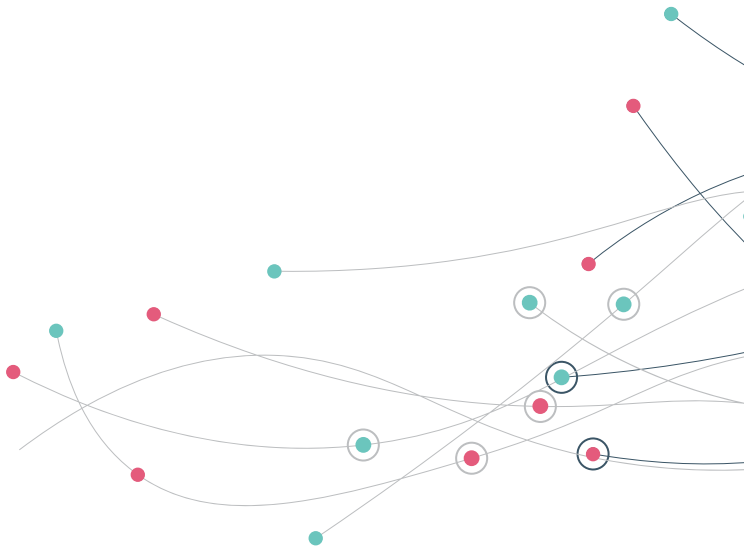
But on a closer look, we see that telecoms deals represented 4% of antitrust intervention but only 1% of global M&A. Similarly, media mergers made up 9% of antitrust intervention compared to only 7% of global M&A. Vodafone's blocked acquisition of TPG in Australia (since overturned on appeal), an abandoned media deal in Germany and a spate of remedies decisions, particularly in the EU and South Korea, are behind this. In the technology sector – the main focus of the policy debates – while the share of antitrust intervention (6%) is well below the proportion of global M&A volumes (17%), it has increased by a third from 2018. Looking forward to 2020, all eyes will be on the technology sector to see whether levels of antitrust intervention continue to rise, especially if some of the potential rule changes identified earlier in the report come into fruition.

Antitrust intervention also focussed on three other sectors in 2019: Industrial & Manufacturing, Life Sciences and Transport & Infrastructure. In each, the share of intervention by authorities was greater than their overall share of global completed M&A volumes.

Industrial & Manufacturing deals represented 23% of total deals subject to antitrust intervention, but only 18% of global M&A. Nearly half of all prohibitions in 2019 were in this sector, including two of the three deals blocked by the EC, as well others in the UK, Germany and South Africa. As reported in previous years, firms in this sector remain willing to attempt strategic consolidation in what are often mature, concentrated markets, and antitrust authorities continue to respond.

For Life Sciences transactions, the figure was 12% of antitrust intervention compared to 7% of global M&A. Remedies cases in the EU, U.S. and Brazil (as well as the FTC's successful challenge to Sanford Health/Mid Dakota) were a large contributor to this, with authorities requiring the sale of particular drugs businesses or pipeline products to address antitrust concerns. And this trend looks set to continue into 2020 – we have already seen the EC, for example, accept commitments from AbbVie to address concerns over its acquisition of rival Allergan.

Finally, deals in the Transport & Infrastructure sector accounted for 7% of antitrust intervention but only 2% of global M&A in 2019. Key cases included the EC's prohibition of Siemens/Alstom, a blocked cash-handling merger in Germany, as well as conditional clearances in the UK and France. This sector may well feature again in next year's report, with the EC currently undergoing three phase 2 reviews – two relating to shipbuilding and one in the aircraft industry.



[18] Source: Refinitiv, Full Year 2019.

Remedies cases remain high (with behavioural commitments a permanent fixture)

TOTAL REMEDIES CASES

CASES RESULTING IN REMEDIES FOLLOWING PHASE 1 AND IN-DEPTH INVESTIGATIONS

by volume

[19] The number of phase 1 conditional clearances for South Korea cannot be determined.
[20] The number of phase 1 conditional clearances for Japan cannot be determined.

Interference by antitrust authorities in the form of remedies remained high in 2019. There were 143 remedies cases in total – slightly up from 2018 figures. Of these, 42 were agreed at phase 1 and 65 after an in-depth review. The remainder relate to South Africa,[21] which saw 36 conditional decisions in 2019, similar to the year before.

In the EU, the number of phase 1 remedies cases fell from 17 to 10 (the lowest in five years), but remained steady at phase 2 with six conditional clearances. Interestingly, two of the phase 2 cases involved purely behavioural commitments – for more on this see below.

In the UK, the CMA once again cleared only a handful of deals with remedies: four at phase 1 and one at phase 2. But, as mentioned earlier, there was a surge in referrals to phase 2 (15, up from ten) which, combined with the increased numbers of frustrated deals, clearly indicates that the CMA is taking a tougher approach.

Remedies cases in the U.S. stayed constant in 2019 at 17. As mentioned earlier, in three of the eight settlements reached by the FTC the commissioners were divided, with dissenting views put forward by Democrats. Last year yielded the largest ever U.S. merger divestment – valued at USD13.4bn – in Bristol-Myers Squibb/Celgene. This deal was particularly notable because the FTC required the divestiture of Celgene's on-market psoriasis drug, Otezla, due to its overlap with BMS's pipeline. And in another life sciences deal (CVS/Aetna) we saw, for the first time, a federal court carry out a detailed assessment of a proposed divestment package. Normally the courts simply rubber-stamp settlements without scrutiny. An eleven month review followed. It remains to be seen if this increased level of oversight (and potential delay to deal timetables) will become more common.

There were five remedies cases in China in 2019, up from four the previous year. Each involved an extensive remedies package. In two cases (Cargotec/TTS and II-VI/Finisar) we saw SAMR make use of its controversial hold-separate remedy, requiring the parties to keep various aspects of their businesses – including management, finance, personnel, pricing, sales and R&D – independent. The resurrection of the hold-separate remedy, last used in 2017, is unwelcome, particularly in the context of foreign-to-foreign deals. But in setting a time limit on the remedy (two and three years in these cases), the impact for the parties is at least not long-term.

We reported last year that the use of upfront buyer and fix-it-first remedies was declining. This continued in 2019. In the EU, the EC required such remedies in only three out of 13 divestment cases (23%, down from 37% in 2018).[22] Even in the U.S., where upfront buyer provisions are commonplace, their use dipped from 80% to 73% of structural remedies cases. For a second year, no upfront buyers were required in China. Only in the UK did we see any uptick – upfront buyer provisions were used by the CMA in all three of its divestment cases in 2019, up from one in five in 2018. This chimes with the more interventionist approach being taken by the CMA.

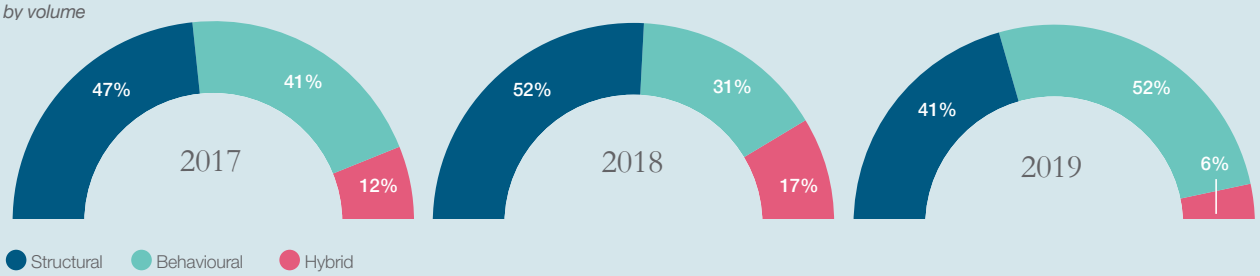
Finally, looking at cross-border deals, we observed that antitrust authorities often require global remedies to address any concerns and can (and do) coordinate with each other in relation to the commitments package. In L3/Harris, for example, divestment of Harris' global night vision business was accepted as a remedy in both the EU and the U.S., and the Canadian Antitrust Bureau cleared the deal on the basis of these conditions. Relying on remedies accepted elsewhere also featured in other key deals: BTG/Boston Scientific was cleared in Spain on the basis of remedies agreed by the FTC, and the Turkish authority's approval of Nidec/Embraco was conditional on the remedies agreed with the EC. Taking a global approach when crafting remedy offers is therefore increasingly important for merging parties.

[21] Where data cannot be split between phase 1 and in-depth cases.
[22] Although a number of decisions have not yet been published, meaning that this figure could rise.

Behavioural remedies are a permanent fixture in conditional cases

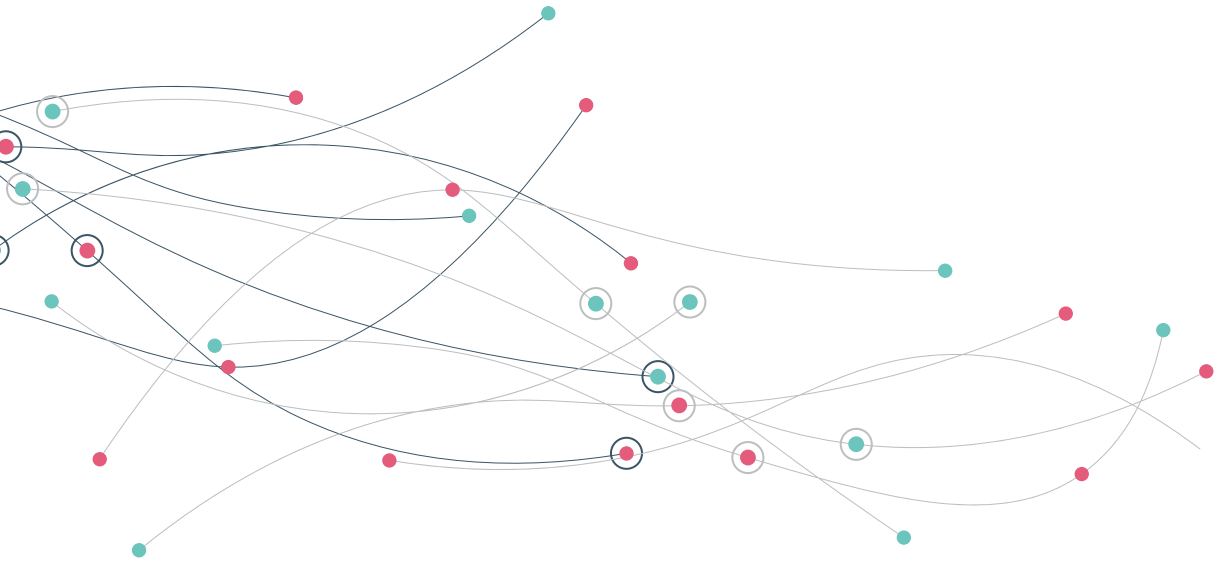
CONDITIONAL CLEARANCES BY TYPE OF REMEDY

by volume

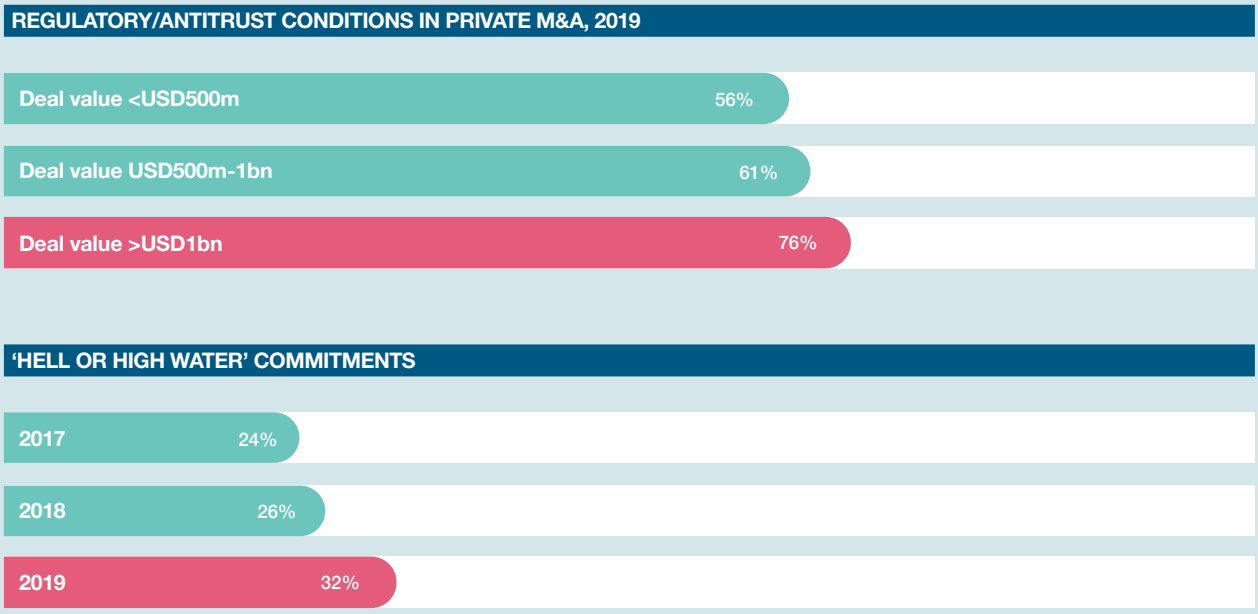


A key global trend in recent years has been the increase in the use of behavioural remedies (ie commitments by parties relating to future conduct) to address antitrust concerns. And 2019 was no different. After dipping below the 50% mark in 2018, last year the figures bounced back up – 58% of all remedies cases involved a behavioural element, either on its own or in combination with a divestment (so-called 'hybrid' remedies). The most common types were grant of access, trading on fair or non-discriminatory terms and confidentiality/firewall commitments.

This trend is influenced by the fact that some jurisdictions, in particular China, have a preference for this type of remedy. In China, all remedies cases in 2019 were either behavioural or hybrid. Even in the EU and the U.S., where the authorities proclaim their preference for structural divestments, we saw instances of behavioural remedies being accepted. The EC accepted them in a third of its phase 2 conditional clearances. Both cases were in the TMT sector (Telia/Bonnier and Vodafone/Liberty Global assets) and involved granting third parties access to, for example, network or services. We also saw behavioural commitments in a phase 1 case (Varta/Energiser assets) – a relatively rare occurrence. And behavioural remedies remain commonplace in a number of EU Member States (including France, Ireland, Italy and Spain), as well as Brazil, India, South Africa and South Korea. We expect to see a similar picture in next year's report.



Execution risk allocation continues to be driven by merger control approvals



Allocation of execution risk continues to be hotly negotiated. According to our research on global private M&A deals, 76% of deals valued over USD1bn were subject to antitrust or other regulatory approvals conditions.[23]

Sellers did, however, continue to push for financial and behavioural protections. We saw reverse break fees being included in deal documentation – Illumina had to pay PacBio USD98m when it abandoned its planned acquisition. And the use of 'hell or high water' commitments increased once again, up to 32% of deals subject to antitrust/regulatory conditions in 2019. A further 6% of deals contained conditions requiring parties to agree to divestments to get clearance.

Finally, sellers showed their concern over the time taken to obtain regulatory approvals, with 'ticking fees' (ie payments by the buyer in the event the deal timetable is delayed due to regulatory review periods) becoming more common. In one case (Nidec/Embraco) we even saw the seller sue the purchaser in a U.S. court for allegedly dragging its feet in dealing with EC concerns about the deal (the judge ultimately dismissed the case, and the deal received conditional EU clearance).

[23] Global trends in private M&A; research based on over 1,250 M&A deals on which A&O has acted. Please be in touch with your usual A&O contact if you would like to learn more about the results.

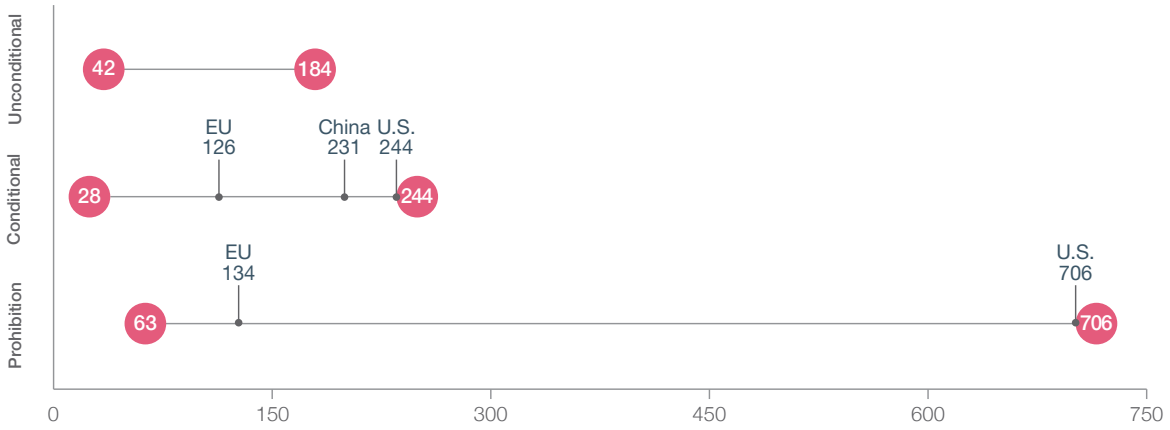
Appendix: typical duration of merger reviews

Weighted average across all jurisdictions surveyed (working days)

	Phase 1		In-depth investigation (including phase 1)		
	Unconditional	Conditional	Unconditional	Conditional	Prohibition
2017	21	80	145	208	289
2018	19	56	152	200	209
2019	19	72	177	224	214

DURATION OF IN-DEPTH INVESTIGATIONS[24]

As a range from jurisdiction with the shortest average to jurisdiction with the longest (working days)



Key takeaways on timing

1. Average time to get unconditional clearance at phase 1 (by far the most likely outcome of a merger review) remains steady at 19 working days.
2. Merging parties continue to employ tactics to try to get complex deals done at phase 1, such as pulling and refiling notifications and extended pre-notification discussions.
3. In the EU, extensions and stop the clock are still the norm in in-depth investigations – all nine phase 2 cases concluded in 2019 were extended by the maximum 20 working days, and seven were also suspended (suspensions averaged 19 working days).
4. Measures announced by the DOJ in 2018 to speed up U.S. reviews did not play out in practice, at least in remedies cases and prohibitions. A novel use of the DOJ's powers to refer disputed issues to arbitration in its challenge to Novelis/Aleris may prove more successful – watch this space.
5. In China, 99% of cases benefiting from the simplified procedure (which applied to over 80% of mergers in 2019) were cleared in an average of 12 working days. The average length of remedies cases decreased slightly to 231 working days, but in all of these cases the parties needed to withdraw and re-file at the end of phase 3 (sometimes twice) in order to get clearance, making timing very unpredictable. Proposed new stop-the-clock powers for SAMR may phase out this practice, but it remains to be seen whether they will improve in-depth investigation lengths or provide more certainty. Overall, though, we observed no adverse impact on review periods involving U.S. companies as a result of the trade tensions between the U.S and China.

[24] From the start of the in-depth review. Excludes South Africa, for which no split could be made.

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Named in Global Competition Review as a 'Global Elite' firm, we are ranked in the top three of GCR's top 100 competition practices in 2020.

We have an unrivalled and multiple award winning track record of securing merger control clearances for clients from antitrust authorities around the world. We were named Competition Team of the Year 2018 at the British Legal Awards for our work on 21st Century Fox/Sky and we also won Competition Team of the Year 2017 at the Legal Business Awards for our work on the WIND/3 Italia JV between VEON and CK Hutchison. Our other experience includes acting for notifying parties or interveners in some of the most high-profile and complex merger control cases in recent years, for example, WPP/Kantar, 21st Century Fox/The Walt Disney Company, Asahi/AB InBev, KPN and E-Plus/Telefónica Deutschland, Cargill/ADM, FedEX/TNT, Imperial Tobacco/Reynolds American, Tullet Prebon/ICAP and Saudi Aramco/Lanxess.

Our involvement in these case demonstrates our ability to secure exceptional results for clients against difficult odds. We have particular expertise in identifying innovative remedies which are likely to satisfy regulators' concerns in the most challenging cases. We also have unrivalled experience in successfully guiding high-profile transactions through national public interest reviews and sector-specific regulatory approval procedures, and managing the interplay between national interest screening regimes and merger control proceedings.

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